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No. 438

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In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, PETITIONER

v.

STOCKARD STEAMSHIP CORPORATION, ET AL.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit entered in these causes on May 26, 1961, the writ to issue, however, only in the event that this Court grants the petitions for writs of certiorari in No. 290 and No. 332, this Term.[1]

[1] The causes to which this cross-petition is directed are only those of the libels in which the Second Circuit ordered a remand for the taking of further evidence as to the meaning of Clause 13 of the charters. The remand was limited to the question of timeliness with respect to claims attacking certain accounting procedures used by the Maritime Commission and Maritime's disallowance of certain specific expenditures in computing hire. See the petitions and the government's opposition filed in Nos. 290 and 332, this Term. The remands involved the following

OPINION BELOW

The opinions in the United States Court of Appeals for the Second Circuit (Pet. App.[2] in No. 290, pp. 25–26; Pet. App. in No. 332, pp. 27a–68a) are reported at 291 F. 2d 598.

JURISDICTION

The judgments of the United States Courts of Appeals were entered on May 26, 1961. On August 17, 1961, the time for filing a conditional cross-petition for a writ of certiorari was extended by Mr. Justice Frankfurter to and including September 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that libels which included claims attacking certain accounting procedures used by the Maritime Commis-

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causes and libelants in the court below: No. 24200, *Stockard Steamship Corporation* v. *United States of America;* No. 24285, *A. L. Burbank & Co.* v. *United States of America;* No. 24286, *T. J. Stevenson & Co., Inc.* v. *United States of America;* Nos. 24287 and 24289, *North Atlantic and Gulf Steamship Co.* v. *United States of America;* No. 24291, *A. H. Bull Steamship Co., Bull-Insular Line, Inc.* and *Baltimore Insular Line, Inc.* v. *United States of America;* No. 24292, *New York and Cuba Mail Steamship Co.* v. *United States of America;* No. 24288, *Luckenbach Steamship Co., Inc.* v. *United States of America.* It is with respect to the judgments entered in these cases that this conditional cross-petition is filed. (The Court of Appeals did not remand all of the libels raising issues of accounting procedure and disallowance of expenditures, but in some cases affirmed the judgments dismissing the libels.)

[2] "Pet. App." refers to the petitions filed in No. 290 or No. 332, this Term, in which the opinions below are set forth.

sion and the Commission's disallowance of certain expenditures in computing charter hire were not necessarily time-barred (on the present records) under the Suits in Admiralty Act, but should be remanded for the taking of further evidence as to the meaning of Clause 13 of the charters as related to the timeliness of these claims.

STATUTE AND CHARTER PROVISION INVOLVED

Section 5 of the Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 745, provides in pertinent part:

> Suits * * * may be brought only within two years after the cause of action arises * * *.

Clause 13 of the charters provides:

> *Additional Charter Hire.*—If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for

shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

STATEMENT[3]

These actions were brought against the United States by various shipping companies which had chartered ships from the government pursuant to the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq.* Their libels, seeking refund of charter hire paid to the government, were predicated, in part, on an attack on the Maritime Commission's accounting methods involving the disallowance by Maritime of "loss-carry backs" (Pet. App. in No. 290, p. 29). In addition, certain of the libels challenged Maritime's disallowance of specific expenditures in its computation of charter hire. These claims are based, in part, on asserted disagreements over "capital necessarily employed" and also challenge the disallowance of certain alleged post-redelivery overhead expenses, management fees, and agency fees (Pet. App. in No. 290, p. 29).

In the *en banc* decision below, Judge Smith, speaking for the majority, ruled that these libels should be remanded to the district court for the taking of further evidence as to the meaning of Clause 13 of the charters with respect to the issue of whether these particular claims were time-barred. Contrary to his ruling on the question of the timeliness of libels as-

[3] In this Statement, we refer only to those facts and parts of the opinions below related to the claims involving accounting procedures and the disallowances of expenditures, which were the subject of the court's remand for the taking of further evidence. For a fuller treatment of the facts and proceedings, see the government's brief in opposition in Nos. 290 and 332, this Term.

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CITATIONS

Statutes:	
Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq*	5
Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 745, Section 5	3

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serting the illegality of the rate of additional charter hire, Judge Smith found that the provisions of Clause 13 might have been intended by the parties to cover the questions of accounting procedures and expenditure disallowances raised by these libels[4] (Pet. App. in No. 290, pp. 38–40).

Judges Clark and Waterman, agreeing with Judge Smith on the question of limitations with regard to the libels asserting illegality of additional charter hire rate, disagreed with Judge Smith on the necessity for a remand on the issues of accounting procedures and expenditure disallowances (Pet. App. in No. 290, pp. 43–49).[5] In their view, Clause 13, either by itself or when read against the background of other pertinent clauses of the charter, could not be read to postpone the necessity for bringing suits on these claims until years after redelivery of the vessels and preliminary payments of additional charter hire (Pet. App. in No. 290, pp. 43–49). Moreover, they thought that the Maritime regulations controlling the payment of additional charter hire required by Clause 13 were com-

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[4] The remands were ordered subject to certain limitations. They included only libels filed within two years of making preliminary statements under Clause 13 or within two years from the last Maritime audit, whichever was earlier (Pet. App. in No. 290, pp. 39–40, 42).

[5] They agreed, however, with Judge Smith that, if there were to be remands on the issues of accounting procedures and expenditure disallowances, these remands should be limited to libels filed within two years of making a preliminary statement under Clause 13 or two years of a final audit, whichever was earlier (Pet. App. in No. 290, p. 49). Judges Friendly and Moore felt that all libels on these issues, as well as on the asserted illegality of the charter rate, should be remanded.

pletely inconsistent with the libelants' assertion of such a postponement (Pet. App. in No. 290, pp. 46–47).

REASONS FOR GRANTING THE WRIT

In Nos. 290 and 332, this Term, respondents here, as well as other libelants, seek review of the *en banc* decision below insofar as it held their libels attacking the legality of the rate of additional charter hire to be time-barred. We are filing a brief in opposition in those cases in which we set forth the reasons why we consider that issue not to warrant review by this Court. While we do not consider the question posed in this cross-petition to call for independent review by the Court, we believe that it should be reviewed if (but only if) the Court grants the petitions in Nos. 290 and 332.

By his ruling remanding certain of the libels for further evidence with respect to accounting procedure and expenditure disallowance questions, Judge Smith interpreted Clause 13 of these charters, in our view, in a fashion not only inconsistent with his analysis of the clause with regard to the illegality-of-rate issue but also with the provisions of Clause 13 and the underlying regulations. In any event, if this Court grants the petitions in Nos. 290 and 332 raising the question of the interpretation of Clause 13 as to one aspect of the case, we believe that it would be proper for the Court to have the entire controversy with regard to Clause 13 before it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petitions for writs

of certiorari in Nos. 290 and 332, this Term, then it should also grant this conditional cross-petition for a writ of certiorari.

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RESPONSE TO GOVERNMENT'S CONDITIONAL CROSS-PETITION

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RESPONSE TO GOVERNMENT'S CONDITIONAL CROSS-PETITION

Respondents join the Government in requesting this Court to review the decision of Judge Smith interpreting Clause 13 of the charters. They agree with the Government (cross-petition, p. 7) that Judge Smith's decision is inconsistent in reasoning, and inconsistent with Clause 13 and the underlying regulations.

The reasons why respondents believe Judge Smith's decision is inconsistent and erroneous are stated (a) in Judge Friendly's dissenting opinion, (b) in respondents' petition, and (c) in their reply to the Government's brief in opposition in No. 332, filed concurrently herewith.

Respectfully submitted,

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